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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 SAMMY THOMAS,
12 CDCR #F-12551,

13 Plaintiff,

14 vs.

15 J. RODRIGUEZ, Correctional Officer;
16 P. COLIO, Correctional Officer,

17 Defendants.
18

Case No.: 3:16-cv-02211-AJB-JMA

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS SECOND
AMENDED COMPLAINT
PURSUANT TO
Fed. R. Civ. P. 12(b)(6)**

[ECF No. 30]

19 Sammy Thomas ("Plaintiff"), currently incarcerated at California State Prison –
20 Los Angeles County, is proceeding pro se and in forma pauperis in this civil rights action
21 filed pursuant to 42 U.S.C. § 1983.

22 Plaintiff claims Calipatria State Prison ("CAL") Correctional Officers Rodriguez
23 and Colio ("Defendants") violated his Eighth Amendment rights by failing to properly
24 secure him in a seatbelt during a prison transport from CAL to a hospital in Indio,
25 California, for a physical therapy appointment on August 12, 2015. *See* Second Amend.
26 Compl. ("SAC"), ECF No. 23 at 5-6.

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II. Procedural History

On April 13, 2017, the Court directed the U.S. Marshal to effect service of Plaintiff's SAC upon Defendants pursuant to 28 U.S.C. § 1915(d) and Fed. R. Civ. P. 4(c)(3) (ECF No. 24).¹

On June 30, 2017, Defendants filed a Motion to Dismiss Plaintiff's Complaint pursuant to FED. R. CIV. P. 12(b)(6) (ECF No. 30). On the same day, the Court issued a briefing schedule as to Defendants' Motion, determined that no proposed findings and recommendations by the magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and S.D. Cal. CivLR 72.3(a) would be necessary, permitted Plaintiff to file an Opposition, and Defendants an opportunity to Reply (ECF No. 31).

On August 18, 2017, Plaintiff filed his Opposition (ECF No. 32), and on August 24, 2017, Defendants filed their Reply (ECF No. 33). The Motion has been determined suitable for determination on the papers; therefore no oral argument was held, and no party was required to appear. *See* S.D. Cal. CivLR 7.1.d.1.

For the reasons discussed below, the Court finds Plaintiff's Second Amended Complaint fails to state an Eighth Amendment claim as to either Defendant Colio or Rodriguez, and therefore GRANTS their Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (ECF No. 30).

II. Plaintiff's Factual Allegations

On the morning of August 12, 2015, Plaintiff alleges Defendants Colio and Rodriguez, both correctional officers at CAL, transported him from CAL to a hospital in Indio, California, for a physical therapy appointment. *See* SAC, ECF No. 23 at 5. Plaintiff does not explain the nature of his medical need for physical therapy on that day, but in another portion of his pleading he alleges to suffer from "degenerative disk disease," and

¹ The Court has dismissed all other claims alleged in the SAC as to all other parties sua sponte for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). *See* ECF Nos. 22, 24.

1 exhibits attached to his SAC show he has been treated for “unresolved” and chronic
2 lower back pain as early as December 2014, when he underwent an MRI of his lumbar
3 spine while incarcerated at the Sierra Conservation Center. *Id.* at 7, 38-40.

4 On August 12, 2015, Plaintiff contends he was “shackled with waist chains and
5 handcuffs,” and “placed in a van equipped with seat belts,” but was unable to fasten them
6 by himself due to the shackles. *Id.* at 5. Plaintiff claims to have asked Colio and
7 Rodriguez, “Are you going to fasten my seatbelt?” But they replied, “No, you’ll be
8 alright.” *Id.* Plaintiff next claims that “[d]uring the transport[, ... the van stopped
9 suddenly and [he] was thrown forward, hit his head, and injured his back.” *Id.*

10 Plaintiff next contends Defendants “continued to drive to the hospital,” where he
11 was examined by the physical therapist, and “completed his physical therapy with
12 difficulty,” before he was driven back to CAL, “this time with a seatbelt.” *Id.*

13 Plaintiff alleges to have filed an inmate grievance related to the incident that was
14 “granted in part.” *Id.* As a result of that grievance, Plaintiff claims the “prison admitted
15 Rodriguez and Colio had violated department policy,” but did not “identify which policy
16 was violated.” *Id.*

17 **III. Motion to Dismiss**

18 **A. Defendants’ Arguments**

19 Defendants Colio and Rodriguez request dismissal of Plaintiff’s Eighth
20 Amendment claims against them arguing that he has failed to allege facts sufficient to
21 show that they acted with deliberate indifference to a serious risk to his safety. *See* Defs.’
22 Mem. of P&As in Supp. of Mot. to Dismiss, ECF No. 30-1 at 5-6. More specifically,
23 Defendants argue this Court should apply a “danger-plus” test to Plaintiff’s failure to
24 protect claims. *Id.* at 3-4.

25 **B. Plaintiff’s Opposition**

26 For his part, Plaintiff contends that he *has* “stated with specific clarity a cognizable
27 claim of deliberate indifference.” *See* Pl.’s Opp’n at 2, 5-7. Specifically, Plaintiff’s
28 Opposition repeats the facts in his SAC, *id.* at 3, and includes *additional* allegations that

1 “Defendants placed a piece of cardboard in the window preventing [him] from being able
2 to see the speedometer,” but that he was nevertheless “able to see out of the side of the
3 van and was able to tell that the Defendants were passing traffic on the 111 freeway and
4 driving faster than the flow of traffic[] when [they] suddenly slammed on the breaks and
5 caus[ed] [him] to be thrown forward, hit his head, and injure his back.” *Id.* at 3. Plaintiff
6 thus contends Defendants’ speed, in conjunction with his request to fasten his seatbelt,
7 his inability to do so on his own, and their failure to properly restrain him, not only
8 “broke the law under § 27315(d)(1) and § 27315(e) of the California Vehicle Code,” but
9 also demonstrates deliberate indifference under the Eight Amendment. *Id.* at 4-6.

10 C. Defendants’ Reply

11 Defendants Reply that the “allegations in the SAC simply state that Defendants did
12 not buckle Plaintiff in, and [that] the van ‘stopped suddenly.’” *See* Defs.’ Reply, ECF No.
13 33 at 2. Defendants ask the Court not to consider any “allegations raised in opposition
14 papers that were not raised on the complaint.” *Id.* Defendants further argue that any
15 alleged violation of California law “cannot state a claim under 42 U.S.C. § 1983.” *Id.* at
16 4.

17 D. Standard of Review

18 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests the legal
19 sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Because
20 Rule 12(b)(6) focuses on the “sufficiency” of a claim rather than the claim’s substantive
21 merits, “a court may [typically] look only at the face of the complaint to decide a motion
22 to dismiss.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).

23 “To survive a motion to dismiss, a complaint must contain sufficient factual
24 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*
25 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.
26 544, 570 (2007)); *Villa v. Maricopa Cty.*, 865 F.3d 1224 (9th Cir. 2017). A claim is
27 facially plausible “when the plaintiff pleads factual content that allows the court to draw
28 the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*,

1 556 U.S. at 678. Plausibility requires pleading facts, as opposed to conclusory allegations
2 or the “formulaic recitation of the elements of a cause of action,” *Twombly*, 550 U.S. at
3 555, which rise above the mere conceivability or possibility of unlawful conduct. *Iqbal*,
4 556 U.S. at 678-79; *Somers v. Apple, Inc.*, 729 F.3d 953, 959-60 (9th Cir. 2013).
5 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
6 statements, do not suffice.” *Iqbal*, 556 U.S. at 678. While a pleading “does not require
7 ‘detailed factual allegations,’” Rule 8 nevertheless “demands more than an unadorned,
8 the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (quoting
9 *Twombly*, 550 U.S. at 555).

10 Therefore, “[f]actual allegations must be enough to raise a right to relief above the
11 speculative level.” *Twombly*, 550 U.S. at 555. “Where a complaint pleads facts that are
12 merely consistent with a defendant’s liability, it stops short of the line between possibility
13 and plausibility of entitlement to relief.” *Iqbal*, 556 U.S. at 678 (citation and quotes
14 omitted); *accord Lacey v. Maricopa Cnty.*, 693 F.3d 896, 911 (9th Cir. 2012) (en banc).

15 Although a district court should grant the plaintiff leave to amend if the complaint
16 can possibly be cured by additional factual allegations, *Doe v. United States*, 58 F.3d 494,
17 497 (9th Cir. 1995), “[d]ismissal without leave to amend is proper if it is clear that the
18 complaint could not be saved by amendment.” *Kendall v. Visa U.S.A., Inc.*, 518 F.3d
19 1042, 1051 (9th Cir. 2008) (citation omitted); *Somers*, 729 F.3d at 960. And while the
20 Court may not consider Plaintiff’s Opposition to determine the propriety of a Rule
21 12(b)(6) motion, it may consider allegations raised in his Opposition when deciding
22 whether amendment would be futile. *See Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th
23 Cir. 2003).

24 E. Eighth Amendment

25 Prison officials have a duty under the Eighth Amendment to avoid excessive risks
26 to inmate safety. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To state a claim
27 under the Eighth Amendment based upon Defendants’ alleged failure to prevent his
28 injury, Plaintiff must allege Defendants Colio and Rodriguez were “deliberate[ly]

1 indifferen[t]” to “conditions posing a substantial risk of serious harm.” *Id.* Deliberate
2 indifference is more than mere negligence, but less than purpose or knowledge. *See id.* at
3 836. A prison official acts with deliberate indifference only if he “knows of and
4 disregards an excessive risk to inmate health and safety; the official must both be aware
5 of facts from which the inference could be drawn that a substantial risk of serious harm
6 exists, and he must also draw the inference.” *Id.* at 837; *accord Clement v. Gomez*, 298
7 F.3d 898, 904 (9th Cir. 2002); *Thomas v. Ponder*, 611 F.3d 1144, 1152 (9th Cir. 2010)
8 (citing *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009)) (“[I]f an inmate presents
9 evidence of very obvious and blatant circumstances indicating that the prison official
10 knew [a substantial risk of serious harm] existed, then it is proper to infer that the official
11 must have known of the risk.”) (alteration in original).

12 While the Ninth Circuit has yet to find an Eighth Amendment deliberate
13 indifference claim in the context of a prison guard’s failure to secure an inmate’s seatbelt
14 during transport, an unpublished memorandum decision notes the possibility that such a
15 claim may be alleged. *See, e.g., Ford v. Fletes*, 211 F.3d 1273, 2000 WL 249124 at *1
16 (9th Cir. 2000) (unpub.) (“Although the district court concluded that Ford failed to allege
17 facts to show that defendants knew of and consciously disregarded an obvious risk to his
18 safety when transporting him in the vehicle with his hands cuffed behind his back, ... he
19 may be able to allege facts to show such deliberate indifference.”) (citing *Farmer*, 511
20 U.S. at 837).

21 Other courts have explicitly found that the failure to provide or secure a seatbelt to
22 a prisoner during transport “does not, standing alone, give rise to a constitutional claim.”
23 *Jabbar v. Fischer*, 683 F.3d 54, 57-58 (2d Cir. 2012); *Spencer v. Knapheide Truck*
24 *Equipment Co.*, 183 F.3d 902, 906 (8th Cir. 1999) (“[W]e do not think that the Board’s
25 purchase of patrol wagons without safety restraints nor its manner of transporting
26 individuals in these wagons were policies that obviously presented a “substantial risk of
27 serious harm.”); *Dexter v. Ford Motor Co.*, 92 Fed. App’x. 637, 641 (10th Cir. 2004)
28 (“[A] failure to seatbelt does not, of itself, expose an inmate to risks of constitutional

dimension.”); *Wilbert v. Quarterman*, 647 F. Supp. 2d 760, 769 (S.D. Texas 2009) (“Considering the different circuit court opinions, it appears that an allegation of simply being transported without a seatbelt does not, in and of itself, give rise to a constitutional claim.”); *Carrasquillo v. City of New York*, 324 F. Supp. 2d 428, 437 (S.D.N.Y. 2004) (“[A] failure to seatbelt does not, of itself, expose an inmate to risks of constitutional dimension’ because the ‘eventuality of an accident is not hastened or avoided by whether an inmate is seat[-]belted.”) (citation omitted); *Simon v. Clements*, No. CV 15-04925-JLS (PLA), 2016 WL 8729781, at *1 (C.D. Cal. June 10, 2016) (“The law is clear that inmates who are transported by correctional officers do not have a constitutional right to the use of seat belts.”); *Newman v. Cty. of Ventura*, No. CV 09-4160-JVS (RC), 2010 WL 1266719, at *10 (C.D. Cal. Mar. 8, 2010) (“[P]laintiff has no constitutional right to seat belts.”), *report and recommendation adopted*, 2010 WL 1266725 (C.D. Cal. Mar. 26, 2010); *King v. San Joaquin Cty. Sheriff’s Dep’t*, No. CIV S-04-1158 GEB KJM P, 2009 WL 577609, at *4 (E.D. Cal. Mar. 5, 2009) (“[A] prison’s or jail’s failure to equip a van or bus with seatbelts for the prisoners does not rise to the level of deliberate indifference as a matter of constitutional law.”), *report and recommendation adopted*, 2009 WL 959958 (E.D. Cal. Apr. 6, 2009).

“However, if the claim is combined with allegations that the driver was driving recklessly, this combination of factors *may* violate the Eighth Amendment.” *Wilbert*, 647 F. Supp. 2d at 769. *See also Brown v. Fortner*, 518 F.3d 552, 559-60 (8th Cir. 2008) (denying summary judgment as to prisoner’s Eighth Amendment claims where “uncontested evidence indicate[d] [Defendant] knew [Plaintiff] was shackled and restrained in a manner that prevented him from securing his own seatbelt,” where Defendant “rejected [Plaintiff’s] request for a seatbelt,” and “drove recklessly and ignored requests by inmate passengers to slow down.”); *Brown v. Morgan* (“*Morgan*”), 39 F.3d 1184, at *1 (8th Cir. 1994) (unpub.) (per curiam) (finding allegations that deputy refused to let prisoner wear a seatbelt, drove at a “high speed in bad weather,” refused to slow down “despite pleas for him to do so, purposely spe[d] up, and smil[ed] when he

1 saw [Plaintiff] was scared,” “sufficient to manifest deliberate indifference for his safety”
2 under the Eighth Amendment); *Rogers v. Boatright*, 709 F.3d 403, 406, 409 (5th Cir.
3 2013) (finding allegations of prisoner “shackled in leg irons and handcuffs ... attached
4 together by a chain,” placed on a “narrow bench that ran the length of the caged portion
5 of [a transport prison] van” without a seatbelt, and who alleged officer was “driving the
6 van recklessly, darting in and out of traffic at high speeds,” and had to “break hard to
7 avoid hitting a vehicle in front of him,” sufficient to state an Eighth Amendment
8 deliberate indifference claim); *Simon*, 2016 WL 8729781 at *2 (“Facts such as whether
9 seat belts were available for use, whether the inmate requested the use of a seat belt,
10 whether the driver knew the inmates were not secured by seat belts, how the officer drove
11 the vehicle, and the traffic conditions at the time of an incident causing injury are all
12 relevant to a determination of whether an inmate can state a claim.”); *Brown v. Saca*
13 (“*Saca*”), No. EDCV09-01608 ODW(SS), 2010 WL 2630891, at *3-4 (C.D. Cal. June 9,
14 2010) (finding allegations of “fully shackled” prisoner, who asked officers to secure his
15 seatbelt, was “refused” and “taunt[ed],” and whose restraints “prevented him from either
16 securing his seatbelt or bracing himself in the event of an accident,” sufficiently alleged
17 Eighth Amendment deliberate indifference claim because he *also* alleged defendants
18 drove “erratically,” and “recklessly drove the van in reverse striking another vehicle.”),
19 *report and recommendation adopted*, No. EDCV09-01608 ODW(SS), 2010 WL 2630998
20 (C.D. Cal. June 28, 2010); *Ortiz v. Garza*, 2016 WL 8730726 at *4 (E.D. Cal. 2016)
21 (“Because Plaintiff alleges [Defendant] was aware the [shackled] prisoners did not have
22 safety restraints, yet drove at high speeds and hit a stationary object, he alleges facts
23 sufficient to [show] deliberate indifference to his safety in violation of the Eighth
24 Amendment.”); *Jamison v. YC Parmia Ins. Grp.*, No. 2:14-CV-1710 GEB KJN P, 2015
25 WL 8276333, at *3 (E.D. Cal. Dec. 9, 2015) (“Taking plaintiff’s allegations as true,
26 defendant Whitehead’s actions of placing a shackled inmate in a van without benefit of
27 seatbelts and then driving recklessly, at a speed of 80 miles per hour, would pose an
28 unreasonable risk of harm.”).

1 Here, Defendants contend the allegations in Plaintiff's SAC—that he was
2 shackled, refused seatbelts, and then “thrown forward” when Defendants “stopped
3 suddenly,” *see* SAC, ECF No. 23 at 5, are insufficient to support a plausible claim of
4 deliberate indifference because they are not accompanied by additional allegations that
5 they “were driving erratically, speeding, making frequent stops,” or doing anything that,
6 in conjunction with the failure to secure him with seatbelts, “exacerbated [Plaintiff's] risk
7 of substantial injury.” *See* ECF No. 30-1 at 3-4. Defendants thus argue that Plaintiff's
8 Eighth Amendment claims must be dismissed because they do not satisfy what they term
9 as the “danger-plus” test applied in *Jamison*, *Wilbert*, and *Simon*. *Id.* Defendants contend
10 that merely “stopping a vehicle suddenly while driving is not inherently reckless in
11 nature,” *id.* at 4-5, and that “deliberate indifference entails something more than mere
12 negligence.” *Id.* at 6 (citing *Farmer*, 511 U.S. at 835, 837).

13 The Court agrees. Like the Plaintiffs in *Wilbert*, *Brown*, *Morgan*, *Rogers*, *Saca*,
14 *Ortiz* and *Simon*, Plaintiff claims he was shackled, unable to fasten his own seatbelt, and
15 that Defendants either failed or explicitly refused a request to secure his seatbelt. *See*
16 SAC, ECF No. 23 at 5-6; *cf.* *Wilbert*, 647 F. Supp. 2d at 770; *Brown*, 518 F.3d at 556;
17 *Morgan*, 39 F.3d at 1184 *1; *Rogers*, 709 F.3d at 406; *Saca*, 2010 WL 2630891 at *3;
18 *Simon*, 2016 WL 8729781 at *1.

19 Plaintiff next claims that “[d]uring the transport[], ... the van stopped suddenly and
20 [he] was thrown forward, hit his head, and injured his back.” *See* SAC, ECF No. 23 at 5.
21 Critically, however, Plaintiff's SAC, unlike the complaints filed by the prisoner/plaintiffs
22 in *Wilbert*, *Brown*, *Morgan*, *Rogers*, *Saca*, *Ortiz*, and *Jamison*, does *not* contain any
23 further factual content to plausibly suggest Defendants were speeding, or driving
24 “recklessly” or “erratically” under the circumstances. *See Wilbert*, 647 F. Supp. 2d at 770
25 (noting plaintiff “also complained that the van was traveling at an unsafe speed”); *Brown*,
26 518 F.3d at 559 (“In addition to the failure to fasten Brown's seatbelt, ... Brown offered
27 evidence of that Fortner was driving in excess of the speed limit, following too closely to
28 the lead van, crossing over double-yellow lines, and passing non-convoy cars when the

1 road markings clearly prohibited doing so.”); *Morgan*, 39 F.3d at 1184 *1 (alleging
2 defendant was “driving at a high rate of speed in bad weather, refusing to slow down
3 despite [Plaintiff’s] pleas for him to do so, purposely speeding up, and smiling when he
4 saw that [Plaintiff] was scared”); *Rogers*, 709 F.3d at 409 (alleging defendant “operated
5 the prison van recklessly, knowing there was a substantial risk that [Plaintiff] would be
6 injured if the van stopped abruptly”); *Saca*, 2010 WL 2630891 at *3-4 (“Plaintiff’s
7 allegations that [Defendants] refused to secure his seatbelt are sufficient to state a claim
8 under the Eighth Amendment because he has alleged [Defendants] acted recklessly.”);
9 *Ortiz*, 2016 WL 8730726 at *4; *Jamison*, 2015 WL 8276333, at *3.

10 Instead, the Court finds Plaintiff’s allegations most like the ones made by the
11 prisoner/plaintiff in *Simon*, who alleged he was “shackled in a manner that did not allow
12 him to fasten his own seat belt,” and that the defendant “did not secure Plaintiff’s seat
13 belt for him,” and then “slammed the van’s brakes suddenly” causing him to be “thrust
14 violently forward, hitting his knees and head on a partition in front of his seat, [and]
15 causing injury.” 2016 WL 8729781 at *1. Like the Court in *Simon*, this Court finds that
16 without some additional “factual content that allows the court to draw the reasonable
17 inference” that Defendants were acting recklessly and with “deliberate indifference”
18 when “the van stopped suddenly,” *see* SAC, ECF No. 23 at 5, *Iqbal*, 556 U.S. at 678,
19 Plaintiff’s Second Amended Complaint currently fails to state a claim for relief under the
20 Eighth Amendment which is plausible on its face. *Iqbal*, 556 U.S. at 678; *Simon*, 2016
21 WL 8729781 at *2.²

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24 ² To the extent Plaintiff contends, also in Opposition to Defendants’ Motion to Dismiss,
25 that Colio and Rodriguez violated Cal. Vehicle Code § 27315, which mandates the use of
26 seatbelts, and/or CAL. CODE REGS., tit. 15 § 3271, which renders them “responsible for
27 the safe custody of the inmates confined” within the California Department of
28 Corrections and Rehabilitation, *see* Pl.’s Opp’n, ECF No. 32 at 4-5, Defendants are
correct to note that violations of state statutes or prison regulations, while perhaps
suggestive of reasonable standards of care, are not redressable as separate causes of
action under 42 U.S.C. § 1983. *See* Defs.’ Reply, ECF No. 33 at 4; *Lovell ex rel. Lovell v.*

1 And while Plaintiff has alleged additional facts in his Opposition regarding
2 Defendants' efforts to block his view of the speedometer, and the speed and/or conditions
3 under which they were driving at the time of his injury, *see* Pl.'s Opp'n, ECF No. 32 at 3,
4 the Court may not consider those allegations when ruling on Defendants' Motion to
5 Dismiss. *See Schneider v. Cal. Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir.
6 1998). It may, however, consider factual allegations raised in Plaintiff's Opposition when
7 deciding whether to grant him leave to amend. *Broam*, 320 F.3d at 1026 n.2.

8 F. Leave to Amend

9 "If a Rule 12(b)(6) motion to dismiss is granted, claims may be dismissed with or
10 without prejudice, and with or without leave to amend." *Hardin v. Wal-Mart Stores, Inc.*,
11 813 F. Supp. 2d 1167, 1173 (E.D. Cal. 2011), *aff'd in relevant part*, 604 F. App'x 545
12 (9th Cir. 2015). "[A] district court should grant leave to amend even if no request to
13 amend the pleading was made, unless it determines that the pleading 'could not possibly
14 be cured by the allegation of other facts.'" *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir.
15 2000) (en banc) (quoting *Doe*, 58 F.3d at 497). Here, the factual allegations raised by
16 Plaintiff in his Opposition suggest he could allege additional facts, when combined with
17 those he has previously alleged related to Colio's and Rodriguez's failure to secure his
18 seatbelt, that could support an Eighth Amendment deliberate indifference claim. *See e.g.*,
19 *Simon*, 2016 WL 8729781 at 2; *see also Perez v. Beard*, No. 2:16-cv-0073-JAM-EFB P,
20 2017 WL 1079937 at *3 (E.D. Cal. March 22, 2017) (granting prisoner leave to amend
21 Eighth Amendment claims against prison transport officers who allegedly failed to secure
22 his seatbelt, and then came to a "sudden stop").

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26 *Poway Unified Sch. Dist.*, 90 F.3d 367, 370 (9th Cir. 1996) ("To the extent that the
27 violation of a state law amounts to the deprivation of a state-created interest that reaches
28 beyond that guaranteed by the federal Constitution, Section 1983 offers no redress.");
accord Crowley v. Nevada ex rel. Nevada Sec'y of State, 678 F.3d 730, 736 (9th Cir.
2012).

1 **IV. Conclusion and Order**


2 For the reasons discussed, the Court:

3 1) **GRANTS** Defendants' Motion to Dismiss Plaintiff's Second Amended
4 Complaint pursuant to Fed. R. Civ. P. 12(b)(6) [ECF No. 30]; and

5 2) **GRANTS** Plaintiff forty-five (45) days leave from the date of this Order in
6 which to file with the Clerk of Court, and serve upon Defendant Colio and Rodriguez's
7 counsel of record, a Third Amended Complaint that addresses the pleading deficiencies
8 identified in this Order. Plaintiff is cautioned, however, that should he choose to file a
9 Third Amended Complaint, it must be complete by itself, and that any claim not re-
10 alleged in it will be considered waived. *See* S.D. Cal. CivLR 15.1; *Hal Roach Studios,*
11 *Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) ("[A]n amended
12 pleading supersedes the original."); *Lacey*, 693 F.3d at 928 (noting that claims dismissed
13 with leave to amend which are not re-alleged in an amended pleading may be "considered
14 waived if not repled."). If Plaintiff fails to comply with these instructions and/or files a
15 Third Amended Complaint that still fails to state an Eighth Amendment claim against
16 Defendants Colio and Rodriguez, his case will be dismissed without further leave to
17 amend. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) ("If a plaintiff does not
18 take advantage of the opportunity to fix his complaint, a district court may convert the
19 dismissal of the complaint into dismissal of the entire action.").

20 **IT IS SO ORDERED.**

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22 Dated: September 5, 2017

23 
24 Hon. Anthony J. Battaglia
25 United States District Judge
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